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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1336~~ 156

CLAIRE IRENE FISHER,
Administratrix of the Estate of Virgil Franklin Fisher,
Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

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CLAIRE IRENE FISHER,
Administratrix of the Estate of Virgil Franklin Fisher,
Deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 21, 1966.

OPINIONS BELOW.

The District Court for the Southern District of Ohio, Eastern Division, granted Respondent's motion for summary judgment without opinion. The opinion of the Court of Appeals for the Sixth Circuit is printed below, Appendix p. 17.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered February 21, 1966, and a copy thereof is appended to this petition, Appendix p. 20.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Petitioner filed an action under the Federal Torts Claims Act against the United States for the wrongful death of her husband. The death was caused by a collision between his automobile and a truck hauling United States Mail under contract with the United States Post Office Department. The District Court granted summary judgment to the United States and the judgment was affirmed by the Court of Appeals. The mail truck was being operated under a contract which the Government claims insulates it from vicarious liability for negligence in its operation.

The Court must consider these questions:

(a) May the United States in the operation of the Star Route System of mail transportation by truck, be classified as a "common carrier"?

(b) If reasonably classified as a "common carrier" is the United States as subject as other carriers to the public policy promulgated by the several states, the Federal Courts and other federal regulatory bodies for the benefit of the general public?

(c) There will then follow the need to resolve this dispute: The Government seeks to insulate itself in the course of the common carriage of mail by truck from vicarious liability under the Tort Claims Act. The mechanism employed is the classical "independent contractor" relationship. Since the United States is vicariously liable under the Tort Claims Act only for negligence of "its employees," and specifically is relieved of liability for the negligence of employees of its independent contractors, an effective contract will insulate the Government from negligence and damages occurring in the course of the mail delivery. The

ultimate question then is this: May the United States escape vicarious liability under the Tort Claims Act for the negligence of a Star Route mail truck driver by creating an "independent contractor" relationship which contrary to public policy delegates control over the driver to another?

There follows from Petitioner's analysis the conclusion that since "control" of this Star Route is by law reserved to the United States, and "control" is the distinguishing characteristic of the employer/employee relationship, the specifically negligent driver was an employee of the Government and the United States is vicariously liable for his conduct.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.

The pertinent portions of the Federal Tort Claims Act, 28 U. S. C. Sec. 1346 and 28 U. S. C. Secs. 2671, 2674 are set forth in the Appendix at pp. 21-22.

STATEMENT.

Petitioner is the widow and Administratrix of the estate of her husband. On behalf of herself and two minor children she brought this action against the United States for damages. Her husband was a passenger in a vehicle which was hit head-on by a mail truck.

The mail truck was negligently driven by Albert Heskett as appears from his affidavit which was filed herein by the United States (R. 6a-7a*.)

Heskett was in the general employ of Walter C. Thompson who held a contract with the United States

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* "R." references are to the Appellant's Appendix below, of which nine extra copies are filed herewith.

Post Office Department, as the primary employer, for the transportation of mail on a so-called "Star Route."

This employment agreement between Heskett's employer and the United States called for the operation of trucks on Ohio highways in transporting the United States mail (R. 7a-21a).

The accident occurred in Ohio.

There is no doubt that the driver Heskett was, at the time of the accident, employed in the transportation of United States mail and there is no doubt that he was employed in such activity for Thompson, who, in turn, is employed by the United States Post Office Department.

The United States is a constitutionally franchised carrier of the mail (U. S. Consti. Art. I, Sec. 8, Cl. 7). The postal system is a governmental monopoly excluding all private competition (*Hoover v. McChesney*, 81 F. 472 (1897)). The only purpose for the mail truck's presence on the road where petitioner's husband was killed was the hauling of the United States mail.

The Star Route Contract creates an entirely unique area of risk for the traveling public. Unlike railroads and airlines, which haul the United States mail as an incident to their business, this Star Route Contract creates a truck transportation system designed only for the transportation of the United States mail.

It is clear that the Tort Claims Act excludes "contractors" with the United States from coverage under the Act as "employees" for whose negligence the Government is liable. This conforms with traditional tort principles under which independent contractors are responsible for their own torts and those of their employees, but the one who engages him to perform the work is not.

The liability of the United States under the Torts Claims Act is limited to actionable negligence committed

by an "employee" of the United States. Heskett must therefore be a "person acting on behalf of a Federal agency" if Petitioner's legal analysis is to be valid.

Heskett was admittedly in the general employ of Thompson. He is also under these facts in the employ of the United States.

There is no claim that vicarious liability is imposed on the United States by reason of his general employment by Thompson. This *is not* permitted under the Torts Claims Act, for this would be making Thompson, "the contractor," an "employee" contrary to the specific definitions contained in Sec. 2671.

On the contrary, Heskett, by operation of the applicable Ohio law, is an employee directly of the "Federal Agency," *the Post Office Department.* The relationship which was created between the United States and Heskett is employer-employee. The attempt by the parties to create a different relationship for the performance of the Post Office Department's work is contrary to the public policy of Ohio.

The United States did employ Thompson to deliver mail. Thompson (and his subemployee Heskett) would be "employees" of the Government for whose negligence the Government would be liable *except* that there is interposed the immunity barrier of the employment contract. Under applicable Ohio law an individual, firm or corporation could not interpose this immunity barrier because of the non-delegable duty rule against transfer of control.

The logic of the traditional rule which frees the general contractor (such as the United States) from responsibility for the conduct of its independent contractors (Thompson and Heskett) is, as stated above, directly based upon the concept of *control over the activity contracted for.*

A finding that the United States could not under Ohio law delegate its duty to retain active control over Thompson and Heskett does not violate these traditional concepts, and further, this Star Route Contract does reserve to the United States an extraordinary degree of control over the details of the work.

It is only through the words of the contract and a fair interpretation thereof that the control retained by the United States is seen.

Among the papers filed in the trial court by the defendant is a Certificate of Oath of mail contractors (App. 8a), signed by Walter C. Thompson, in which he describes himself as being "employed in the care, custody and conveyance of the mail as contractor on the route named." Looking to the general provisions of the Contract (App. 8a), general provision No. 4, described as "Servant's Requirements" clearly sets forth that the Post Office Department establishes the schedule of arrivals and departures and running times, going so far as to point out that: "C. If more than ten minutes are taken for opening or closing the mail at any intermediate post offices, the scheduled time will be increased by the additional time taken" (App. 10a). Section 5 of the general provisions provides for the transportation of inspectors of the Post Office Department on the vehicles at any time that such inspector presents proper credentials (App. 11a). Section 6, "Service to Post Office and Railroad Connections" (App. 11a); Section 7, "Mail Service to Patrons" (App. 12a); Section 8, "Additional Services for Patrons" (App. 13a) and Section 10, "Changes in Service and Schedule" clearly involve a *minute* control, not merely a *general* control, over all the aspects of the truck while engaged in the transportation of the United States mail (App. 13a, 14a). Section 13, describing the safety regulations, actually in-

corporates therein all details of the motor carrier safety regulations which must be complied with by the contractor (App. 14a, 15a). Section 14, described as "Prohibitions" actually sets forth detailed requirements concerning the types of persons to be employed (App. 15a) and this appears also under Section 18, "Laws and Regulations Applicable" (App. 17a) and Section 20, "Non-Discrimination" (App. 17a, 18a). Very broad rights are given to the contractor to be excused or released from the performance of this contract and, in addition, the United States, pursuant to Section 16 titled "Cancellation," may terminate the contract or, put another way, may fire the contractor (App. 16a).

More than merely the ultimate result, as was said above, was of importance to the United States. The reservation to the United States of the various controls set forth in the contract seems abundant evidence of a degree of control of the manner of performing the work, sufficient to establish an employer-employee relationship. There is much more control in the United States Post Office than merely assuring the ultimate delivery of the mail. It had to be delivered in a certain kind of truck, picked up at certain locations, managed and protected under certain conditions, delivered at certain times at certain locations by persons possessing certain qualifications and transported in accordance with motor carrier regulations defining every detail of the operation of the truck.

When one interprets such a contract in the total situation, it seems clear the Star Route system is merely an extension, a continuing arm of the ordinary transportation of mail by the United States Post Office.

Control over the operations of this truck system for the transportation of the mail is reserved by the very terms of the contract in the United States.

This centering of control over this kind of transportation system is, even apart from the contract, imposed upon the United States by the law of Ohio.

The vicarious liability for negligent operation of this tranportation system flows naturally to the one having the right and duty to control the operations. In this case it is the United States Post Office Department.

REASONS FOR GRANTING WRIT.

The Court should decide whether a non-delegable duty of the United States may be enforced against the United States under the Tort Claims Act.

This Court in *Delehite v. United States*, 346 U. S. 15 (1953), excluded liability for breach of a local rule of non-delegable duty *based upon concepts of absolute liability without fault.*

This Court did not decide whether the United States was liable for the negligence of one who except for a local rule of non-delegable duty would be an employee of an independent contractor.

The liability of the United States should be judged in the same manner as the liability of a private individual or carrier under state law. *Lloyd v. United States*, 211 F. Supp. 750 (S. D., Calif., 1962), *Libby v. United States*, 209 F. Supp. 793 (S. D. Mich., 1962), *Mass. Bonding & Insurance Co. v. United States of America*, 352 U. S. 128 (1956).

The Ohio law is that the United States, under these facts, would be classified as a common carrier, for it holds itself out to the public as engaged in the business of transporting property from place to place, for compensation, offering its services to the public generally. *Columbus-Cincinnati Trucking Co. v. Public Utilities Commission*,

141 Ohio St. 228, 47 N. E. 2d 623 (1943); *United States v. Smith*, 215 F.2d 217 (6th Cir. 1954).

In appropriate circumstances the United States may be a common carrier. *Ure et al. v. United States*, 93 F. Supp. 779 (1950); *White et al. v. United States*, 193 F.2d 505 (9th Cir. 1950).

The United States is *in fact* in no different position than any other motor carrier. The United States contracts with the American public to transport mail and, itself, in turn employs the Star Route operators to haul the products of its customers, the public. The operation of the Post Office Department and the transportation of mail is technically exempt from the specific prohibitions against delegating control of the transportation system contained in the rules of the Interstate Commerce Commission. However, the operation of the Post Office Department and the transportation of mail *in Ohio, is* controlled by the specific common law of Ohio. Ohio law *does* prohibit this kind of delegation of control, and from this law the United States is not exempt.

The public policy of Ohio regulates carriers so as to make the carrier responsible to the public for wrong done or injury inflicted by the carrier and those acting for it throughout the entire course of any transportation project undertaken by the carrier. Under such rule the employing carrier (like the United States), as well as his independent contractor (like Thompson), performing transportation for such carrier, may be held liable to third persons (like Petitioner) for injuries resulting from the negligent conduct of the independent contractor in such transportation. *Behner v. Industrial Comm'n of Ohio*, 154 Ohio St. 433 (1951), 96 N. W. 2d 403.

We are saying, therefore, that even assuming the *contractual* relationship is characterized as "independent

contractor" between Thompson and the United States, the United States is liable under the Tort Claims Act by reason of the public policy of Ohio to one injured by the negligent operation of a mail truck. A carrier such as the United States has an non-delegable duty to retain effective control of its transportation business, control which imposes vicarious liability if negligent injury intervenes. *Covington v. Steinbrook*, 61 Ohio St. 215 (1899), 55 N. E. 618.

This liability is grounded in the doctrine of respondeat superior for such hired operator's negligence. *Shaver v. Shirks Motor Express*, 163 Ohio St. 484 (1955), 127 N. E. 2d 355. The United States should not be permitted to escape liability by attempting in derogation of Ohio law, to delegate its duties to an independent contractor. *Duncan v. Evans*, 134 Ohio St. 486 (1938), 17 N. E. 2d 13; *Simon, a minor, v. McCullough Transp., Inc.*, 155 Ohio St. 104 (1951), 98 N. E. 2d 39. See also *Leonard v. Kreider*, 51 Ohio App. 474 (1935), 1 N. E. 2d 956.

It is a well settled general principle that the tort liability of the United States is, in actions under the Federal Tort Claims Act, governed by the law of the state where the tortious conduct took place. *Richards v. United States*, 369 U. S. 1. See also *Valente v. United States*, 264 F.2d 800 (6th Cir. 1959); *United States v. Hutchins*, 268 F.2d 69 (6th Cir. 1959); *Brown v. United States*, 273 F.2d 433 (6th Cir. 1960).

Therefore, under applicable Ohio law, the United States undertook to transport mail, did in fact transport mail, in a leased truck over Ohio highways. Any person, firm or corporation undertaking to engage in such commodity (mail) transportation on Ohio highways as a regular business operation would be a carrier, would require certification under Ohio law, would require a permit for conducting such business, would be classified as a common carrier, and *would not be permitted to insulate itself from*

liability by employing another to provide truck and driver to perform its work.

The United States should not be permitted to avoid responsibility for the injury negligently caused in the service of the Government. Nor is the non-delegable duty theory as applicable to this case a species of liability without fault. The Government mail truck was operated negligently and caused the injury. The Government had a non-delegable duty in Ohio not to operate its mail trucks negligently.

If the Post Office Department was in fact operated by a private franchised person or firm and, in this posture, had leased a truck and driver for the transportation of its goods on Ohio roads, the private person (to whom the Post Office Department is identified) would be liable for the negligence of the driver while engaged in performing pursuant to the lease.

The public policy of Ohio is intended to protect third persons from negligence causing injury while a vehicle is engaged in the transportation business of the carrier. Much of the litigation in this field arises due to the failure on the part of the owner-operator to be financially responsible. The public policy of Ohio thus prevents the really responsible party (who gains from the business enterprise which uses the highway) from escaping liability by insulating himself with a person who is not financially responsible.

The Court will observe in this case that there is no requirement in the contract entered into between Thompson and the United States that Thompson carry any insurance on his vehicle. To permit the creation of an *insulating* independent contractor relationship would be violative of the public policy of Ohio, *and the reason for such public policy.*

In this day and age of falling immunity barriers, we

should not erect another in the path of progressive legal thought.

Before an artificial immunity rule which has never before been adopted by this Court to avoid responsibility of the United States under the Tort Claims Act is broadened, the effect upon the public should be considered.

The United States Post Office should be responsible for injury and death caused in the operation of its business.

There are substantial and important Federal questions presented as grounds for granting this writ. The various courts which have considered these questions have given confusing and evasive responses.

No case has directly considered the effect of a local rule of *non-delegability of control over the contracted work* and the resulting effect upon the status of the persons performing under the contract.

Different from the usage of this non-delegability theory in the case of work of a highly dangerous character, such as in the *Delehite* case, here we seek only to establish because of non-delegability the control necessary to make the contractual relationship employer/employee. The *liability* of the Government under the Tort Claims Act must then be established vicariously for the negligence of its employee.

It is true that the question of who is a federal employee for purposes of the Tort Claims Act must be decided by reference to federal law, rather than state law, as the Court of Appeals states. (page 18) However, under both federal and Ohio law, it is well settled that the question must be resolved by determining who had control of the work. *Standard Oil v. Anderson,* 212 U. S. 215; *Strangi v. United States,* 211 Fed. 2d 305.

The control of the carriage of freight in high-powered motor vehicles on public highways is, under both Ohio and

Federal law non-delegable. The regulations of the Interstate Commerce Commission, as they relate to motor carriers, reserves to the carrier all control and resulting responsibility to the public for the operation, regardless of the terms of any contract or lease. 49 U. S. C., Sec. 304 (e).

Under Ohio law, a holder of public franchise cannot, by employing an independent contractor, delegate its duties so as to absolve itself from liability. *American Transit Lines v. Ralph R. Smith,* 246 Fed. 2d 86 (6th Cir. 1957). See also *Venuto v. Robinson,* 118 Fed. 2d 679 (3rd Cir. 1941); *Hodges v. Johnson,* 52 Fed. Supp. 488 at 490-492 (W. D. Va.).

The decision of the Court of Appeals in this case has in effect said that whereas any other person, firm or corporation engaged in the public carriage of goods over Ohio roads pursuant to this contract would be responsible for injury caused in the course of the carriage, the United States is not responsible under the Tort Claims Act.

Under the particular facts in this case the applicable law says the parties to the contract are "employer-employee" because of public policy considerations. The fact one party is the United States should not thereby change that relationship to one under an independent contract.

If it is a good rule for the people, it is a good rule for the Government of the people.

CONCLUSION.

The issues created on the present appeal are founded upon the following factual and legal concepts:

(1) The plaintiff-petitioner's husband was killed as a result of the negligent operation of a truck which was in fact engaged exclusively in the transportation of the United States mail.

(2) The issue arises immediately as to the party responsible for the negligent operation of this truck. Petitioner claims it is the United States. Respondent will claim that it was the Star Route contractor and his driver.

(3) There is no dispute on the basic contract law of Ohio in that the criteria for determining whether an employer/employee relationship has been created or, conversely, an independent contractor relationship has been created, is the control retained by the prime contractor over the work to be performed.

(4) There is no dispute that the United States business was being conducted, and that the United States mail was being transported on this truck. The United States did undertake to create an independent contractor relationship between itself and the truck owner and operator. The issue most fundamental to this appeal is whether in fact or in law the relationship which was created was employer/employee or independent contractor.

(5) It is clear under the Federal Tort Claims Act that if an independent contractor relationship was created, then under the specific exclusion of the Act, the United States has no liability for the negligence of the contractor in this case.

(6) It, therefore, is necessary for the Petitioner to establish that an employer/employee relationship existed at the time of this accident between the United States and the owner/operator of the mail truck.

(7) The Court of Appeals found the United States had sufficiently delegated the control over the operation of the truck to such an extent that the

United States succeeded in creating an independent contractor relationship and the resulting immunity which is granted to a prime contractor for the negligence of its independent contractor, even though the latter is engaged in the performance of the prime contractor's work.

(8) Petitioner contends that the very wording of the contract did not succeed in effecting the shedding of control by the United States so as to make an independent contract and interpose the immunity. The contract itself retained such detailed control of operations that in fact an employer/employee relationship was created.

(9) Assuming, however, that the United States did enter into such a contract as would otherwise accomplish this divesting of its control, it is the Petitioner's primary claim on this appeal that insofar as this relationship affected other persons, **the United States was not permitted by reason of the public policy considerations to delegate or divest itself of the control over this trucking operation by the use of a so-called independent contract.**

(10) Under the Federal Tort Claims Act the liability of the United States is to be judged in the same manner as the liability of another citizen. No citizen operating as a common carrier could create a contract to effectively divest itself of control over the operation and, thus, liability for negligent operation. Neither can the United States.

(11) Very simply, the United States had undertaken the function of being a common carrier of mail. The United States had determined that the pick-up and delivery of the mail in certain localities be accomplished by way of trucks being operated over the

highways of the several states. The United States made the business judgment that this common carriage of the mail could be more economically accomplished by the hiring of trucks and drivers not in the general employ, nor classified as civil servants of the Postal Service. The mechanics for accomplishing this common carriage of the mail was to use the contract we are dealing with in this case. As between the United States and its contractor, the United States did seek to shed the mantle of control which is the foundation for vicarious liability. It is the contention of the Petitioner that the laws of the State of Ohio and the United States vitiates any intent of the parties to that contract which would have accomplished this delegation of control from the United States to the contractor.

(12) With this contract being contrary to public policy, the control remains in the United States and the effective liability which the public policy seeks to retain in the common carrier is, in fact, retained in the United States so that in every sense the relationship that is created is employer/employee.

By this analysis the United States is vicariously liable for the negligent conduct of the driver of the mail truck, and should be answerable for damages occasioned by this negligent operation.

For the reasons set forth above, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided February 21, 1966.)

Before: WEICK, Chief Judge, EDWARDS, Circuit Judge, and CECIL, Senior Circuit Judge.

PER CURIAM. Claire Irene Fisher, plaintiff-appellant, brought this action in the United States District Court for the Southern District of Ohio, Eastern Division, against the United States, under the Federal Tort Claims Act. (Sections 1346(b),[1] 2671,[2] et seq., Title 28 U. S. C.) The plaintiff-appellant is the duly qualified and acting administratrix of the estate of her husband, Virgil Franklin Fisher. She brought the action for the wrongful death of her husband alleged to have been caused by the negligence of an employee of the United States. Ohio Rev. Stat. ch. 2125 (1964).

The deceased met his death as a result of injuries sustained in a collision between an automobile in which he was riding and an automobile being driven by one Albert A. Heskett. Heskett was driving a 1961 Ford Econoline

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[1] (b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

[2] "Federal Agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

truck for Walter C. Thompson who had a star route contract with the United States Post Office for the transportation of mail between Zanesville, Ohio, and Coshocton, Ohio. The truck was being driven by Heskett in the performance of Thompson's contract at the time the accident happened.

The question presented on this appeal is whether Heskett was an employee of the United States within the meaning of the Federal Tort Claims Act. On a motion for summary judgment (Rule 56, Federal Rules Civil Procedure) the district judge held that Thompson was an independent contractor and that Heskett was not an employee of the United States. He sustained the motion for summary judgment and the plaintiff-appellant appealed.

There are no disputed facts material to the issue before us and the question presented is one of law. The general rule to determine whether a relationship is that of employer and employee or independent contractor may be stated as follows:

> "If the right to control the manner or means of performing the work is in the person for whom the work is performed, the relationship is that of employer and employee or master and servant; but if the control of the manner or means of performing the work is delegated to the person performing the work, the relationship is that of independent contractor." *Behner v. Indus. Comm.*, 154 O. S. 433, 437.

The principle is substantially the same under either Ohio or Federal law. *Motor Freight v. Ebright*, 143 O. S. 127, 135; *Bobik v. Indus. Comm.*, 146 O. S. 187; *The Standard Oil Co. v. Anderson*, 212 U. S. 215, 221; *Strangi v. United States*, 211 F. 2d 305, 307. The question of who is a federal employee for the purposes of the Tort Claims Act is governed by federal law. *Courtney v. United States*,

230 F. 2d 112, 114, C. A. 2; *Blackwell v. United States*, 321 F. 2d 96, 98, C. A. 5; *Brucker v. United States*, 338 F. 2d 427, 428 (footnote 2), C. A. 9, cert. den. 381 U. S. 937; *Pattno v. United States*, 311 F. 2d 604, 605, C. A. 10, cert. den. 373 U. S. 911.

We conclude from our examination and analysis of the star route contract here in question that the relationship is that of independent contractor. Heskett was not an employee of the United States. See *Smick v. United States*, 181 F. Supp. 149; *Thomas v. United States*, 204 F. Supp. 896.

We find no merit to plaintiff-appellant's contention that the letting of this contract by the Post Office was a non-delegable duty. *Pierce v. United States*, 142 F. Supp. 721,[3] cited by plaintiff-appellant in support of her theory of non-delegable duty is not analogous to the case at bar. This case involved the doctrine of non-delegable duty under Tennessee law. As the court said at p. 729:

> "In the first instance the government was guilty of negligence in erecting and maintaining the substation in a condition hazardous to workmen."

Also, the government was in control and possession of the premises where the accident happened.

Non-delegable duty was well defined by the court at p. 734, as follows:

> "As the doctrine of nondelegable duty is applied in this state it is not a rule of strict liability regardless of fault. Negligence is required, the sole effect of the doctrine being to preclude the owner-employer from escaping liability for negligence which was a proximate cause of injury on the ground that others may have been guilty of negligence, which was also a

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[3] Affirmed 235 F.2d 466, C. A. 6.

proximate cause of injury. As in any other case the basis of liability is negligence."

See also, *Mahoney v. United States*, 220 F. Supp. 823, 826.

In *Covington and Cincinnati Bridge Co. v. Steinbrock & Patrick*, 61 Ohio St. 215, also cited by plaintiff-appellant, the owner was responsible for maintaining a hazardous condition. He left standing the walls of a building destroyed by fire. This was held to be a menace to the public and the property of others in the vicinity.

There was nothing unusually hazardous about letting a contract to someone for carrying mail in a truck over the highways of the state. Nor was the United States negligent in letting such a contract. Obviously the United States was not in control of the premises at the site of the accident. Clearly the doctrine of non-delegable duty is not applicable to the facts of the case now before us.

The United States was not a common carrier under the facts of this case. Neither the argument nor the cases cited relative to liability of common carriers is applicable here.

The judgment of the District Court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed February 21, 1966.)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

STATUTES INVOLVED.

28 U. S. C. 1346. United States as defendant.

(b) Subject to the provisions of chapter 171* of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2671. Definitions.

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

* * * * *

28 U. S. C. 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

49 U. S. C. 304. Regulations governing use of vehicles owned by others.

(e) Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo insurance covering all such equipment.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1336

CLAIRE IRENE FISHER, ADMINISTRATRIX OF THE ESTATE OF VIRGIL FRANKLIN FISHER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States Post Office let a "star route contract" [1] to Walter C. Thompson of Zanesville, Ohio for the transportation of mail between Zanesville and Coshocton, Ohio for a term beginning April 28, 1962, and ending June 30, 1963. On March 8, 1963, Albert A. Heskett, while employed by Thompson, had a collision with an automobile that resulted in the death of Virgil F. Fisher, a passenger in the automobile. At the time of the accident, the truck driven by Heskett

[1] A "star route contract" is "a contract for the transportation of mail over a post road other than a railroad and may include collection and delivery service to patrons of the postal service." 39 U.S.C. 6401.

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was hauling United States mail under the contract.[2] Petitioner brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that the death of her husband was caused by Heskett's negligence.[3]

The court of appeals affirmed *per curiam* the district court's entry of summary judgment in favor of the United States (356 F. 2d 706, Pet. App. 17–20). The court of appeals ruled that Thompson was an independent contractor of the United States and that therefore Heskett, Thompson's employee, was not an "employee of the Government." 28 U.S.C. 1346(b), 2671. Thus, the United States could not be liable for Heskett's negligence. The court rejected petitioner's contention that the United States could be held liable on the theory that it had a "non-delegable duty" to retain control over Thompson and Heskett, noting that the doctrine of non-delegable duty is applicable only where the defendant remains in charge of premises upon which hazardous activities are being performed by an independent contractor. Here, the court noted, there "was nothing unusually hazardous about letting a contract * * * for carrying mail in a truck over the highways of the state. Nor was the United States negligent in letting such a contract. Obviously the United States was not in control of the premises at the site of the accident" (Pet. App. 17–20).

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[2] Petitioner states that Heskett was driving a "mail truck" (Pet. 3). It was not, however, government owned, as this statement might imply.

[3] Contrary to petitioner's suggestion (Pet. 3), Heskett's negligence has not been conceded, but rather was expressly denied in an answer to plaintiff's interrogatories. The question of negligence, of course, was not reached by the district court.

The decision of the courts below is clearly correct, and further review is unwarranted. Petitioner concedes (Pet. 14) that under the Federal Tort Claims Act the United States is not liable for the negligence of independent contractors. 28 U.S.C. 2671, 1346(b). Applying the established rule that, if control of the manner and means of performing the work is left to the person actually doing it, he is an independent contractor, the court of appeals found that under the "star route" contract Thompson was an independent contractor, not an employee of the government. This was clearly so, since the manner and means of performing the contract were left up to Thompson and Thompson—not the United States—was under the contract to give "personal supervision" to any employees he used to carry out the contract. Every other court that has dealt with such contracts for carrying mail has reached the same conclusion.[4]

Petitioner's reliance upon the tort doctrine of "nondelegable duty" is misplaced. As the court below ruled, that doctrine is inapplicable unless the activity resulting in the injury is unusually hazardous and takes place on premises controlled by the person who employed the independent contractor. Accord: *Galbraith* v. *United States*, 296 F. 2d 631, 634 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8).

[4] See *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1); *Thomas* v. *United States*, 204 F. Supp. 896 (D. Vt.); *Smick* v. *United States*, 181 F. Supp. 149, 151 (D. Nev.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 282 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, 746–747 (W.D. Va.); *Fleming* v. *Gregory*, 36 F. Supp. 776 (E.D. La.).

Neither condition was met here. In any event, to apply such a doctrine here, thus imposing on the government liability for the negligence of its independent contractors, would contravene the express terms of the Federal Tort Claims Act. The Act provides for liability "only on a 'negligent or wrongful act or omission' of an employee" (*Dalehite* v. *United States*, 346 U.S. 15, 44–45), and it explicitly states that independent contractors are not employees of the government (28 U.S.C. 2671). Thus, the United States is not liable for the negligence of its independent contractors even though in some circumstances a private employer may be liable for the negligence of his independent contractors.[5] *E.g.*, *United States* v. *Page*, 350 F. 2d 28, 34 (C.A. 10), certiorari denied, 382 U.S. 979; *Dushon* v. *United States*, 243 F. 2d 451, 454 (C.A. 9); *Strangi* v. *United States*, 211 F. 2d 305 (C.A. 5); *United States* v. *Hull*, 195 F. 2d 64, 67 (C.A. 1).

Petitioner lastly contends (Pet. 15) that "the United States was not permitted by reason of the public policy considerations to delegate or divest it-

[5] As the court below recognized (Pet. App. 18–19), it has been uniformly held that the question of who is a federal employee for purposes of the Federal Tort Claims Act is governed by federal, not State, law. *Blackwell* v. *United States*, 321 F. 2d 96, 98 (C.A. 5); *Brucker* v. *United States*, 338 F. 2d 427, 428, n. 2 (C.A. 9), certiorari denied, 381 U.S. 937; *United States* v. *Hainline*, 315 F. 2d 153, 156 (C.A. 10), certiorari denied, 375 U.S. 895; *Pattno* v. *United States*, 311 F. 2d 604, 605 (C.A. 10), certiorari denied, 373 U.S. 911; *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2). Therefore, it cannot aid petitioner if the tort law of some States equates independent contractors with employees.

self of the control over this trucking operation by the use of a so-called independent contract." This contention overlooks the fact that Congress has expressly authorized the Post Office Department to enter into such "star route" contracts. 39 U.S.C. 6401, *et seq.*

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 1966.

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